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Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

In re DUSTIN BUSSON-SOKOLIK,
*Debtor*

DUSTIN BUSSON-SOKOLIK AND CHOMI PRAG,
*Petitioners*

v.

MILWAUKEE SCHOOL OF ENGINEERING,
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Federal Rule of Appellate Procedure 38 or Federal Rule of Bankruptcy Procedure 8020 permits monetary sanctions against attorneys or parties in uncalculated and unfettered amounts when bad faith and frivolousness are absent from an appeal?

2. Whether the time to file an appeal runs for all parties from entry of an order disposing of the last remaining motion in Federal Rules of Appellate Procedure 4(a)(4)(A)(iv) through 4(a)(4)(A)(vi) when a district court exercises jurisdiction in a bankruptcy appeal under Federal Rule of Appellate Procedure 6(b)?

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) the following list identifies all the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The petitioner here, appellant below, is Chomi Prag.

The petitioner here, debtor-appellant below, is Dustin Busson-Sokolik.

The respondent here, appellee below, is the Milwaukee School of Engineering.

## RULE 29.6 STATEMENT

Petitioners are not corporate entities; they have no parent corporation and do not issue stock.

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Petitioners, Chomi Prag and Dustin Busson-Sokolik, respectfully petition the Court for a writ of certiorari to review judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The Seventh Circuit's opinion (App. A, 1a) is reported at 635 F.3d 261, Bankr. L. Rep. P. 81, 929 (7th Cir. 2011). Orders of the district court (App. C, 21a) and bankruptcy court (App. D, 26a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered February 10, 2011. The court of appeals' order denying petitioners' timely request for rehearing and rehearing en banc was entered March 15, 2011. (App. E, 38a). This petition is timely according to Supreme Court rules 13.1 and 13.3 because it was filed within 90 days from entry of the order denying rehearing.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The appendix in this petition contains Title 11, chapter 5 of the United States Code, 11 U.S.C. § 523(a)(8), effective January 3, 2005. (App. I, 49a).

Also in the appendix are the following rules:

Federal Rule of Bankruptcy Procedure 8020 as amended December 1, 2009, (App. I, 49a), Federal Rule of Appellate Procedure 38 as amended December 1, 2010, (App. I, 50a), Federal Rules of Appellate Procedure 4(a)(4)(A)(iv) through (vi) as amended December 1, 2008, (App. I, 50a) and Federal Rule of Appellate Procedure 6(b)(1)(A) as amended December 1, 2008. (App. I, 51a).

## STATEMENT OF THE CASE

### A. The student's loan.

Dustin Busson-Sokolik, (hereinafter 'Sokolik'), attended the Milwaukee School of Engineering, ('MSOE'). Direct costs were expenses owed by the student directly to the school. Indirect costs were incidental to attendance not owed directly by the student to the school.

Sokolik obtained free financial aid to attend MSOE. He also obtained a federal loan. Additionally, Sokolik's mother, neither a co-signer nor a student, obtained a federal loan for her son to attend MSOE. After free financial aid is accepted by Sokolik, and the federal loans are guaranteed direct costs owed to MSOE were satisfied and excess monies remained.

Sokolik signs and dates a promissory note to MSOE for $3,000. Previous remaining unused proceeds are comingled with the MSOE loan and sent by MSOE to Sokolik's mother.

Sokolik did not spend or control loan proceeds.

MSOE sued Sokolik in Racine, Wisconsin circuit court obtaining default judgment April 9, 2005, based on breach of contract for failure to repay the loan according to the promissory note.

1. The proceedings below.

Sokolik filed chapter 13 bankruptcy June 13, 2005, pre-BAPCPA, converting it to chapter 7 on May 1, 2006. Before being discharged from his chapter 7 he brought an adversary action to determine dischargeability of the MSOE loan in relation to 11 U.S.C. § 523(a)(8). He argued the loan's purpose was non-educational because he owed no direct costs to the school when he signed it and he received no benefit from the loan because he never spent it. *In re Murphy*, 282 F.3d 868 (5th Cir. 2002) establishes this standard.

The bankruptcy court found the MSOE loan was excepted from discharge and ordered Sokolik to pay MSOE the balance of the underlying default judgment obtained in circuit court and $8,955 in post-petition adversarial attorney fees due to the promissory note. (App. D, 26a).

The bankruptcy court cited a student borrower case, *In re Murphy*, 282 F.3d 868 (5th Cir. 2002), and a co-signed student loan case, *In re Barth*, 86 B.R. 146 (Bankr. W.D. Wis. 1988). Additionally, the bankruptcy court cited *City of Riverside v. Rivera*, 477 U.S. 561 (1986) to award MSOE post-petition adversarial attorney fees. (App. D, 35a). Sokolik timely filed an amended motion to reconsider. The order denying the amended motion to reconsider was

entered July 24, 2007. (App. F, 40a). This was the final order in the bankruptcy adversary.

Sokolik timely appealed to the district court July 30, 2007.

The district court did not enter a written order on merits of the appeal and as a consequence neither applied nor interpreted the bankruptcy code. Instead, on December 4, 2008, the district court announced it affirmed the bankruptcy court.

Sokolik timely filed his first appeal to the Seventh Circuit December 31, 2008.

The Seventh Circuit affirmed the bankruptcy court stating it reviewed the district court's application of the bankruptcy code de novo. (App. A, 2a). The Seventh Circuit cited *In re Murphy*, 282 F.3d 828 (5th Cir. 2002) creating a rule of law to determine dischargeability of a student's loan by asking "...whether the lender's agreement with the borrower was predicated on the borrower being a student who needed financial support to get through school." (App. A, 7a).

In regards to post-petition adversarial attorney fees awarded by the bankruptcy court to MSOE, the Seventh Circuit found Sokolik waived the fact that state circuit court judgment on the MSOE loan caused language in the loan to become unenforceable. (App. A, 10a.).

The Seventh Circuit also held MSOE had a contractual right to collect adversary attorney fees.

(App. A, 8a). Lastly, the Seventh Circuit found waiver of an argument allowed the district court to strike Sokolik's reply brief. (App. A, 11-12a).

B. Suspension of briefing at the Seventh Circuit.

After Sokolik filed his first notice of appeal and first opening brief to the Seventh Circuit memoranda regarding jurisdiction was ordered and briefing suspended. One may assume briefing was suspended because Sokolik filed his first notice of appeal before the district court entered a written order on the Federal Rules of Civil Procedure 59(e) and 60(b) motion he filed December 8, 2008.

Appellant was ordered to file memorandum regarding jurisdiction. After this was filed appellee was ordered to respond. Sokolik argued briefing should not be suspended pending an order on his rule 59(e) and 60(b) motion because Federal Rule of Appellate Procedure 6(b) states that Federal Rule of Appellate Procedure 4(a)(4) does not apply to bankruptcy appeals. Therefore, filing a rule 59 or rule 60 motion in a bankruptcy appeal with the district court does not extend the time to appeal.

Appellee argued a rule 59(e) and 60(b) motion should be interpreted as a motion for rehearing under Federal Rule of Bankruptcy Procedure 8015 thereby extending the time to appeal under Federal Rule of Appellate Procedure 6(b)(2)(A) therefore briefing should be suspended pending entry of the district court's order on the rule 59(e) and 60(b) motion.

After MSOE's response the Seventh Circuit suspended briefing without stating why or what case supported suspension. (App. B, 19a).

Briefing was suspended until the district court entered a written order awarding fees to MSOE December 10, 2009. (App. C, 21a). In this order awarding fees the district court denied Sokolik's rule 59(e) and 60(b) motion by stating it was denied during a May 8, 2009, hearing. (App. C, 21a).

Also in this order monetary sanctions were imposed against Sokolik and his attorney, Chomi Prag, for filing a frivolous appeal under Federal Rule of Bankruptcy Procedure 8020. The district court held Sokolik and his attorney jointly and severally liable to MSOE in the amount of $61,942.50 against attorney Prag and $80,290.15 against Sokolik.

The district court entered a final document titled judgment January 27, 2010. (App G, 44a).

Attorney Prag and Sokolik timely appealed the district court's final written judgment February 24, 2010. They timely appealed the district court's written sanctions order December 11, 2009, simultaneously appealing the denial of his rule 59(e) and 60(b) motion and bringing up for review all interlocutory orders entered or stated by the district court. On December 31, 2008, Sokolik timely appealed the district court's announcement that the bankruptcy court was affirmed.

Petitioners did not amend previous notices of appeal.

C. The sanctions.

The bankruptcy court made no award of monetary sanctions. The district court did, under Federal Rule of Bankruptcy Procedure 8020, holding attorney Prag and Sokolik jointly and severally liable for $61,942.50 against attorney Prag and $80,290.15 against Sokolik. There was no distinction as to the amount of the underlying bankruptcy judgment and sanction award amounts.

The Seventh Circuit did not find the district court abused discretion in its award of sanctions (App. A, 2a) but reduced the district court's award in half vacating $30,971.25 thereby leaving attorney Prag and Sokolik jointly and severally liable for $30,971.25 and Sokolik also liable for the underlying judgment of the bankruptcy court in the amount of $18,347.65 coupled with $2,098.87 in judgment interest. (App. A, 18a).

1. The proceedings below.

In district court MSOE filed a motion against petitioners for filing a frivolous appeal under Federal Rule of Bankruptcy Procedure 8020.

The district court agreed finding the following sanctionable: filing a Federal Rule of Bankruptcy 9011 motion without abiding by the so called 21 day safe harbor rule or filing it at all, filing a notice of appeal from the bankruptcy court's order on Sokolik's amended motion to reconsider, the late filing of the bankruptcy court's oral findings of fact and conclusions of law transcript due to the

transcribing company going out of business, for appealing to the Seventh Circuit before Sokolik's rule 59 and 60 motion and MSOE's rule 8020 motion for attorney fees were entered, for objecting to MSOE's rule 8020 motion for attorney fees, for not showing the unreasonableness of the bankruptcy court's award of attorney fees, for numerous misstatements in the record, for shifting theories on appeal, for violating "other rules of conduct" and for wasting the court's time. (App. C, 21a).

The district court did not elaborate what petitioners misstated, what "theories" were shifted or what "other rules" were violated. It is unknown how the district court arrived at the amount of sanctions awarded to MSOE, where the amounts were derived or how the amounts reflected violations of Federal Rule of Bankruptcy Procedure 8020. One may assume, as the Seventh Circuit did, that sanction amounts were based on the final set of all billable hours submitted by MSOE in the district court. (App. A, 17a).

The Seventh Circuit found petitioners committed numerous mistakes in district court therefore the district court's award of sanctions was reasonable. (App. A, 17a). Also the sanctions award serves the deterrent purposes of rule 8020. (App. A, 17a). Also the manner in which the appeal was litigated was frivolous. (App. A, 15-16a).

How the court of appeals arrived at the amount of sanctions it awarded to MSOE, where the amounts were derived or how the amounts reflected violations of Federal Rule of Bankruptcy Procedure 8020 is

unknown. One may assume the sanctions awarded by the Seventh Circuit were arrived by dividing and vacating one-half the district court's award. The reduction in sanctions was not because the district court erred, was unreasonable or because the district court abused discretion. Rather, the reduction of sanctions was because Sokolik was a student that filed bankruptcy. (App. A, 17a).

Finally, the court of appeals found the appeal itself not to be frivolous. (App. A, 16a). Also neither attorney Prag nor Sokolik appealed in bad faith. (App. A, 17a).

D. Basis for federal jurisdiction in the lower courts.

The basis of the bankruptcy court's federal jurisdiction to determine the dischargeability of the MSOE loan rested on 28 U.S.C. § 157(b)(2)(I).

The basis of the district court's federal jurisdiction to review the final order of the bankruptcy court rested on 28 U.S.C. § 158(a)(1).

The basis of federal jurisdiction in the United States Court of Appeals for the Seventh Circuit to review decisions of the district court rested on 28 U.S.C. § 158(d)(1) and 28 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

### I. Discretion to impose sanctions is limitless when bad faith and merits of an appeal are unconsidered.

The authority to sanction is derived by statute, rule, or inherent power. In this case Sokolik and his attorney were ordered by the district court to pay MSOE's attorney fees December 10, 2009 (App. C, 21a) under Federal Rule of Bankruptcy Procedure 8020 (hereinafter 'FRBP 8020'). FRBP 8020 gives district courts hearing an appeal, or bankruptcy appellate panels, discretion to award damages and costs to an appellee if an appeal is determined to be frivolous.

The current version of FRBP 8020 was revised 2010 and matches the 2009 version in effect when the sanctions order was entered by the district court.

FRBP 8020, effective December 1, 1997, is titled Damages and Costs for Frivolous Appeal and mirrors Federal Rule of Appellate Procedure 38 (hereinafter 'FRAP 38'). FRAP 38 is titled Frivolous Appeal—Damages and Costs.

The advisory committee's notes regarding FRBP 8020 state:

> By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

According to FRBP 8020 courts of appeals, district courts and bankruptcy appellate panels have identical authority respectively to award damages and costs in connection with frivolous appeals. The difference being FRAP 38 applies to cases filed in courts of appeals, FRBP 8020 applies to bankruptcy appeals filed in district courts.

One common link in each rule is the phrase "frivolous appeal". Damages and costs can be awarded under FRBP 8020 in connection with a frivolous appeal and under FRAP 38 if an appeal is determined frivolous.

Some circuits decide whether an appeal is frivolous using one step asking whether the merits, the arguments, of an appeal are frivolous. If the merits aren't the inquiry ends and no sanctions are awarded. If the merits are frivolous sanctions are awarded.

Other circuits decide whether an appeal is frivolous using two steps, asking first whether the merits are frivolous. If the merits are not frivolous the inquiry ends and no sanctions are awarded. But

if they are a second step of inquiry is required asking whether the offending party pursued the frivolous appeal in bad faith. Where bad faith is lacking sanctions are not awarded even where the merits are frivolous.

Some individual circuits disagree amongst themselves as to whether the proper inquiry to award sanctions for a frivolous appeal includes the offending party's bad faith.

*Wilton Corp. v. Ashland Casting Corp.*, 188 F. 3d 670, 676-677 (6th Cir. 1999) and *In re 60 East 80th Street Equities, Inc.*, 218 F.3d 109, 118-119 (2nd Cir. 2000) are two cases addressing and acknowledging this disagreement within and between circuits as to whether awarding sanctions for a frivolous appeal contains the element of bad faith. Two cases in the Seventh Circuit that demonstrate the conflict include *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1241 (7th Cir. 1986) where frivolous merits of an appeal and bad faith are required to justify an award of sanctions and *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987) where only frivolous merits are required.

This Seventh Circuit decision radically departs from the plain meaning of FRBP 8020, from cases examining FRBP 8020 and FRAP 38 and from circuit precedent by concluding a frivolous appeal is one that is not frivolous and lacks any bad faith on the part of an appellant and their attorney. This circumvents the authority allowed under FRBP 8020 and FRAP 38 to penalize a frivolous appeal.

> "("[W]here an appeal challenges actions or findings of the district court to which an appellate court gives deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant's arguments are frivolous"). If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 407 (1990).

The advisory committee's notes regarding FRAP 38 make clear that damages are awarded by a court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

Furthermore, the Seventh Circuit's decision also permits unlimited monetary penalties against an appellant and their attorney for failing to file a perfect appeal and for actively participating in an appeal. Additionally, the monetary penalties do not have to be tied to losses suffered by an appellee or caused by a frivolous appeal.

It is very difficult, if not impossible, for attorneys to advise clients wishing to appeal whether the act of appealing itself will result in monetary penalties even when the basis of an appeal has merit. This causes a chilling effect on attorneys and litigants. As a result, the only sure way to know you will not be subject to sanctions is to either win in the lowest court or not appeal if you lose.

Neither solo-practioners nor corporate law firms are immune from this decision and practicing outside the seventh circuit offers no guarantee of protection. This decision can be cited by any federal court in the country to penalize appellants and their attorneys. Whether the attorney works pro-bono or not, knowing a court can sanction you for not filing a frivolous appeal, under rules that expressly state otherwise, and for not acting in bad faith, in unfathomable amounts, leaves much to be desired if one wishes to appeal. This kind of chilling effect trickles down from attorney to client ultimately resulting in attorneys asking themselves and their clients whether anything is really worth that kind of risk.

II. **Waiting for written rulings on motions filed under Federal Rules of Civil Procedure 59 or 60 can result in losing the right to file a bankruptcy appeal.**

Federal Rule of Appellate Procedure (hereinafter 'FRAP') 6 is applicable to appeals from a judgment, order or decree of a district court or bankruptcy appellate panel exercising jurisdiction in a bankruptcy case. Under FRAP 6(b)(1)(A) FRAP 4(a)(4) does not apply.

FRAP 4(a)(4) addresses the effect a motion has on a notice of appeal. Under FRAP 4(a)(4)(A)(iv) through (vi) the following post judgment motions extend the time to appeal until entry of an order: (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 28 days

after the judgment is entered. At the time appellant filed his first notice of appeal to the Seventh Circuit the Federal Rules of Appellate Procedure amended December 1, 2008, was effective and allowed 10 rather than 28 days under FRAP 4(a)(4)(A)(vi).

FRAP 4(a)(4) does not apply in bankruptcy appeals therefore filing a motion in that section with a district court would not defer the time to appeal until entry of the order.

Although memoranda regarding this issue were filed, the Seventh Circuit did not enter a written order explaining whether timely filed Federal Rule of Civil Procedure (hereinafter 'FRCP') 59 and 60 motions suspend the time to appeal. However, the Seventh Circuit did postpone briefing until the district court entered the order awarding fees to MSOE where Sokolik's FRCP 59(e) and 60(b) motion was denied in writing.

The district court cited Sokolik's filing his first notice of appeal to the Seventh Circuit before entry of the FRCP 59(e) and FRCP 60(b) motion as reason to sanction under FRBP 8020. (App. C, 21a).

Because there is no order, only indication, by the Seventh Circuit that it believes filing a notice of appeal in a court of appeals is premature before entry of an order on a FRCP 59 or 60 motion adequate interpretation of FRAP 6(b)(1)(A) did not occur. The Seventh Circuit's inference is not in agreement with all circuits. In some circuits the only mechanism that extends the time to appeal is a timely filed motion for rehearing in the district court

under Federal Rule of Bankruptcy Procedure 8015 as stated in Federal Rule of Appellate Procedure 6(b)(2)(a).

> "In *Butler v. Merch. Bank & Trust Co.*, 2 F.3d 154, 155 (5th Cir.1993), the court held that Federal Rule of Civil Procedure 59 (governing motions to set aside a judgment or for a new trial) was not applicable to a district court sitting as a bankruptcy appellate court. The court noted that " 'Bankruptcy Rule 8015 provides the sole mechanism for filing a motion for rehearing' " from a final order of the district court sitting in that capacity. Id. (quoting *Matter of Eichelberger*, 943 F.2d 536, 538 (5th Cir.1991)). We agree with this analysis, as did *English Speaking Union*, 353 F.3d at 1019." *In re Bli Farms, partnership*, 465 F.3d 654, 658 (6th Cir. 2006).

Filing a notice of appeal upon entry of a FRCP 59 or 60 order can result in the lost right to appeal where a district court lacks jurisdiction to entertain such motions. Losing the right to appeal is severe and permanent. Because the Seventh Circuit did not enter a written order on this issue filing notices of appeal after entry of FRCP 59 and 60 orders could result in jurisdictional expiration in courts of appeals. The same holds true in any circuit that does not expressly state otherwise.

Where the time to appeal is ambiguous so is the advice attorneys must give clients, especially when

such ambiguity can be used to sanction appellants and their attorneys. As a result the attorney has two options to offer a client, filing a possible premature appeal thereby adequately protecting the right to appeal and running the risk being sanctioned for doing so or waiting to file an appeal until entry of FRCP 59 or 60 orders and running the risk of losing the right to appeal.

However, if FRCP 59 or 60 motions are interpreted as Federal Rule of Bankruptcy Procedure 8015 motions where the time to appeal runs from entry of the order disposing of the motion under FRAP 6(b)(2)(A), then timely filing any of the motions listed under FRAP 4(a)(4)(A) or a motion for rehearing under FRAP 6(b)(2)(A) would postpone the time to appeal.

> "Applying *Moy* to the bankruptcy context, then, we hold that irrespective of how parties characterize their motions for reconsideration in bankruptcy appeals, a motion for reconsideration filed within Bankruptcy Rule 8015's ten-day limit should be treated as an 8015-motion that postpones appellate review during its pendency." *Englgh-Speaking Union v. Johnson*, 353 F.3d 1013, 1020 (D.C. Cir. 2004).

This important issue should be addressed now rather than continue percolating due to the compelling danger of losing rights to appeal.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 9, 2011

## APPENDIX A

Electronically Filed 02/10/11 – Doc # 74 (7th Cir.)

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 08-4317, 09-4009 & 10-1456

IN RE:
DUSTIN JOHN BUSSON-SOKOLIK,
*Debtor.*
DUSTIN BUSSON-SOKOLIK and CHOMI PRAG,
*Appellants,*
*v.*
MILWAUKEE SCHOOL OF ENGINEERING,
*Appellee.*

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 2:07-cv-00801—Charles N. Clevert, Jr., *Chief Judge.*

ARGUED SEPTEMBER 14, 2010—DECIDED FEBRUARY 10, 2011

Before BAUER, FLAUM and HAMILTON, *Circuit Judges.*

BAUER, *Circuit Judge.* This case comes to us as a direct appeal from the Eastern District of Wisconsin's decision to affirm findings of the United States Bankruptcy Court for the Eastern District of Wisconsin. The courts below found: (1) that a $3,000 student loan which Dustin Busson-Sokolik received from the Milwaukee School of Engineering ("MSOE") in 1999 was a non-dischargeable debt under the United States Bankruptcy Code, and (2) that the school was entitled to collection costs and attorney's fees in connection with the bankruptcy proceedings pursuant to the promissory note for the loan signed by Busson-Sokolik. The district court also: (1) denied a motion for sanctions against the school, and (2) imposed sanctions against Busson-Sokolik and his attorney, Chomi Prag. Busson-Sokolik and Prag appeal each of these determinations. After reviewing the district court's application of the Bankruptcy Code de novo and the underlying factual findings in the case for clear error, we affirm. As to the district court's imposition of sanctions against Busson-Sokolik and Prag, while we do not find any abuse of discretion in the court's decision to impose sanctions in this case, we do find the amount of the sanctions assessed to be excessive and therefore hold that the sanctions be reduced by half.

## I. BACKGROUND

Busson-Sokolik was a student at MSOE from September 1999 until May 2000. On October 29, 1999, Busson-Sokolik signed a promissory note with MSOE in the amount of $3,000, agreeing in relevant part as follows:

> I promise to pay the school, or a subsequent holder of the Promissory Note, the sum of amount(s) advanced to me under the terms of this Note, plus interest and other fees which may become due as provided in this Note. I promise to pay all reasonable collection costs, including attorney fees and other charges, necessary for the collection of any amount not paid when due . . . My signature certifies I have read, understand, and agree to the terms and conditions of this Promissory Note.

MSOE sued Busson-Sokolik in a Racine County, Wisconsin state court in April 2005 to recover unpaid sums under the loan agreement and obtained a default judgment of $5,909.63. In June 2005, Busson-Sokolik initiated a Chapter 13 bankruptcy proceeding, which was later converted to a Chapter 7 proceeding, in May 2006. On his bankruptcy petition, he listed MSOE as a creditor. In August 2006, Busson-Sokolik filed an adversary complaint against MSOE to determine the dischargeability of his debt to MSOE. The bankruptcy court found that the debt was non-dischargeable and found that Busson-Sokolik owed MSOE $16,248.78, an amount that included costs and attorney's fees.

Busson-Sokolik appealed the bankruptcy court's decision to the district court. Lengthy delays in filing ensued and a series of motions alleging misconduct on both sides were filed. Busson-Sokolik filed a motion for sanctions under Fed. R. Bankr. P. 9011 based on alleged false statements in MSOE's

brief and MSOE moved to strike portions of Busson-Sokolik's reply brief, claiming that it contained arguments that were never raised in the opening brief or in the bankruptcy court. MSOE also moved for costs and fees under Fed. R. Bankr. P. 8020, which permits recovery of such costs and fees when a party has filed a frivolous appeal.

The district court judge denied Busson-Sokolik's motion for sanctions, but granted MSOE's motion for costs and fees under Fed. R. Bankr. P. 8020, finding that Busson-Sokolik's appeal was frivolous. He also granted MSOE's motion to strike arguments in Busson-Sokolik's reply brief not previously raised, finding those arguments waived. Finally, he affirmed the bankruptcy court's judgment and awarded $80,290.15 to MSOE, specifying that Busson-Sokolik and his attorney were jointly and severally liable for $61,942.50 of the judgment, and that Busson-Sokolik was solely liable for the remaining $18,347.65.

Busson-Sokolik and attorney Prag have timely appealed to this court.

## II. DISCUSSION

### A. The Dischargeability of Busson-Sokolik's Loan from the Milwaukee School of Engineering

A key issue is whether the MSOE loan constitutes a non-dischargeable debt under 11 U.S.C. § 523(a)(8). We review questions of law pertaining to the Bankruptcy Code de novo and the factual

determinations underlying the lower courts' conclusions for clear error. *See Wiese v. Cmty Bank of Cent. Wis.*, 552 F.3d 584, 588 (7th Cir. 2009); *Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004). Section 523(a)(8) creates exceptions to the general discharge of a debtor's financial obligations in bankruptcy under 11 U.S.C. § 727. Under § 523(a)(8)(A), an individual debtor is not discharged from a debt for "(i) an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship or stipend," unless excepting such debt from discharge would impose undue hardship on the debtor and the debtor's dependents. The bankruptcy court and the district court each found that the MSOE loan was non-dischargeable under § 523(a)(8)(A). We agree.

We note at the outset the parties' failure to explicitly identify whether the applicable framework for the court's analysis should be § 523(a)(8)(A)(i) or (ii). Though the parties refer to § 523(a)(8)(A) generally, the analysis below and in the parties' briefing before this court tracks § 523(a)(8)(A)(i). So, section 523(a)(8)(A)(i) will be our framework.

It is undisputed that MSOE is a § 501(c)(3) non-profit institution. While it seems clear to us that the funds were furnished as part of a loan program, Busson-Sokolik disputes that the funds transferred constituted a loan. We do not find his argument

compelling. For there to be a loan, there must be "(i) a contract, whereby (ii) one party transfers a defined quantity of money, goods or services, to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date." *In re Chambers,* 348 F.3d 650, 657 (7th Cir. 2003). The October 1999 promissory note evinces a contract for the transfer of $3,000 to be repaid at a later date. Since the Bankruptcy Court made a reliable factual finding that the $3,000 was transferred to Busson-Sokolik's student account on November 9, 1999, each of the three elements of a loan are present.[1]

Busson-Sokolik next challenges whether the loan can properly be considered "educational," as required to bring the loan within § 523(a)(8)(A). While some courts look to the use of the funds received to determine whether a loan is educational, we adopt the approach taken by the Fifth Circuit in *In re Murphy,* 282 F.3d 868 (5th Cir. 2002). In so doing, we hold that it is the purpose of a loan which

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[1] Busson-Sokolik claims that "no funds changed hands" between him and MSOE, but since he does not dispute that his student account was credited with the loan money, this argument is unfounded. If the loan money was transferred to the student's account, it became available for his use, much like a bank deposit. While the facts indicate that a credit on Busson-Sokolik's student account was later refunded to his mother, this is irrelevant to the question of whether a loan was made to Busson-Sokolik in the first place. Finding no clear error on the question of whether the funds were in fact transferred to Busson-Sokolik and no defects in the formation of a valid contract between the parties, we affirm the finding that the sum MSOE transferred to Busson-Sokolik was a loan.

determines whether it is "educational." This approach seems most consistent with the language of

§ 523(a)(8)(A). It also aligns with the broader goal of protecting lenders against debtors who divert educational funds toward other uses. In our view, adopting a "use" test would be problematic. Such a test would enable students who abuse funds intended for their education to receive the benefit of a discharge, while those who use the loan proceeds as intended would "retain the burden of paying them even after a chapter 7 discharge." *Murphy,* 282 F.3d at 873. The "purpose" test avoids this potential problem by refocusing the inquiry on the nature and character of the loan. For example, rather than trying to determine whether a computer purchased with loan money was used for schoolwork, personal use or some combination of both, we need only ask whether the lender's agreement with the borrower was predicated on the borrower being a student who needed financial support to get through school.

We find the following facts established below relevant to our inquiry into the purpose of the MSOE loan: (1) MSOE is a school; (2) the loan was part of a package that included scholarship and grant money toward completion of Busson-Sokolik's education at MSOE; (3) the promissory note for the loan was signed while Busson-Sokolik was a student at MSOE; (4) Busson-Sokolik had to be a student to be eligible for the loan he received from MSOE; and (5) the MSOE loan money was deposited into Busson-Sokolik's student account at MSOE, an account he presumably would not have had if he were not a

student. Together these facts establish that the loan was part of a program specifically designed by the school to provide financial support to students working to complete their education. Under the purpose driven test this court has adopted, there is no question that the loan was educational. As a result, we affirm the finding that 11 U.S.C. § 523(a)(8) bars Busson-Sokolik from discharging his debt to MSOE in bankruptcy because the debt resulted from an educational loan.

B. The Imposition of Collection Costs and Attorney's Fees

We now turn to Busson-Sokolik's argument that the bankruptcy court improperly allowed MSOE to recover costs and attorney's fees in this case.

Under the "American Rule," a litigant who prevails in a lawsuit is not ordinarily allowed to collect attorney's fees from the losing side. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975). However, this rule can be overcome by statute or by an enforceable contract with a provision regarding the allocation of attorney's fees. *See Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.,* 549 U.S. 443, 448 (2007).

Busson-Sokolik is correct that there was no statutory basis for an award of attorney's fees during the bankruptcy proceedings. However, the basis for the bankruptcy court's award of fees was contractual, not statutory. Under the promissory note for the MSOE loan, Busson-Sokolik agreed in

writing to pay "all reasonable collection costs, including attorney's fees and other charges, necessary for the collection of any amount not paid when due." The bankruptcy court found a valid contract existed between the parties that allowed MSOE to recover its fees based on the above-referenced language in the promissory note. This was not error. As the Supreme Court held in the *Travelers* case, "it remains true that an otherwise enforceable contract allocating attorney's fees (i.e. one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise." *Travelers,* 549 U.S. at 448. The fact that the fees were incurred litigating a bankruptcy case does not disallow MSOE's contract based claim for attorney's fees under *Travelers.* Since the promissory note was an enforceable contract, the fees were separately recoverable under the substantive law of contracts. Furthermore, Busson-Sokolik has not argued that any portion of the Bankruptcy Code specifically prohibits a court from awarding such fees under a contract theory. Finding no applicable exception in the Bankruptcy Code and no barrier to formation of a valid contract between MSOE and Busson-Sokolik, we affirm the award of costs and attorney's fees to MSOE pursuant to the terms of the promissory note.

In concluding our discussion of Busson-Sokolik's claim that fees were improperly awarded, we note his argument that the district court erred in striking portions of his reply brief that related to the merger doctrine. The district court found that Busson-

Sokolik failed to raise the merger doctrine in his initial brief at the district court level. Chief Judge Clevert therefore held that Busson-Sokolik had waived any argument that the fee award was improper based on the merger doctrine. We agree with the district court that the merger issues were waived and decline to apply an exception to waiver for the reasons set forth below.

Waiver occurs when an appellant attempts to raise an issue on appeal that was not adequately raised below. This court has held that when an issue was not raised in the bankruptcy court, a finding that the issue is waived at the district court level is "the correct result, since to find otherwise would permit a litigant simply to bypass the bankruptcy court." *Matter of Weber*, 25 F.3d 413, 415 (7th Cir. 1994). When asked at oral argument what her best effort was to raise the doctrine of merger before the bankruptcy court, Busson-Sokolik's counsel was unable to present any evidence that the issue was addressed in that court. Instead she indicated that her focus had been on the "American rule" and the lack of a statutory basis for awarding the fees. Since we find no evidence in the record or from Busson-Sokolik's counsel that the issue was raised in the bankruptcy court, we hold that any argument related to the merger doctrine was waived before it reached the district court.

Though it is within this court's discretion to find an exception to waiver and to consider an appellant's argument despite the appellant having waived it, the circumstances here hardly justify an exception. It is

only under "exceptional circumstances" that we will hear an argument not adequately presented below. *Matter of Weber,* 25 F.3d at 416. Busson-Sokolik argues that we should consider the merger issue because "an award by the bankruptcy court of close to $9,000 in attorney's fees to the Milwaukee School of Engineering based on an unenforceable contract is inherently unfair." As we have already discussed above, there was a valid contract between the parties which provided for the allocation of attorney's fees. Busson-Sokolik's characterization of the contract as "unenforceable" is therefore incorrect. As to the amount of the fees awarded, Busson-Sokolik's characterization is similarly misguided. Busson-Sokolik provides no support for his proposition that a $9,000 fee in a case such as this is inherently unreasonable or unfair. The bankruptcy court explicitly found that MSOE attorney's fees in the amount of $8,955 were reasonable. Absent any meaningful challenge to the award by Busson-Sokolik, we see no reason to disturb that finding.

The district court first became aware of Busson-Sokolik's merger argument in a reply brief. At that point the issue was waived twice over: first, because the argument was never raised in the bankruptcy court; and second, because arguments raised for the first time in a reply brief as opposed to the appellant's opening brief are deemed waived. *See, e.g., Nelson v. La Crosse County Dist. Atty.*, 301 F.3d 820, 836 (7th Cir. 2002); *James v. Sheahan,* 137 F.3d 1003, 1008 (7th Cir. 1998). The proper response to an argument improperly raised in such a brief is to move to strike the offending portion of the

brief. *Cleveland v. Porca Co.*, 38 F.3d 289, 297 (7th Cir. 1994). MSOE timely filed a motion to strike the relevant portions of Busson-Sokolik's reply brief and the district court properly granted the motion. Since Busson-Sokolik has failed to show "exceptional circumstances" that would make this case a favorable candidate for an exception to waiver, we decline to discuss the merits of those portions of his argument that relate to the merger doctrine.

### C. The Parties' Motions for Sanctions

Finding no error in the district court's decision to grant MSOE's motion to strike portions of Busson-Sokolik's reply brief, we now turn to Busson-Sokolik's arguments that the district court erred (1) in denying his request for sanctions against MSOE under Fed. R. Bankr. P. 9011, and (2) in entering sanctions against him and his attorney, Chomi Prag, under Fed. R. Bankr. P. 8020. We review both determinations for abuse of discretion.[2] Such abuse occurs only when a court has acted contrary to the law or reached an unreasonable result. *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir. 2000).

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[2] "Abuse of discretion" is the clear standard for evaluating a judge's decision to impose sanctions in a bankruptcy case. *See In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir. 2000). While the standard for evaluating a judge's decision *not* to impose sanctions in a bankruptcy case is somewhat less clear, we adopt the Sixth Circuit's approach of using the "abuse of discretion" standard. *See In re Downs*, 103 F.3d 472, 480 (6th Cir. 1996) (holding that the applicable standard of review for evaluating a bankruptcy court's denial of Fed. R. Bankr. P. 9011 sanctions is "abuse of discretion" and noting similar approaches taken by the Ninth and Tenth Circuits).

1. Denial of Motion for Sanctions Against MSOE

An attorney is subject to sanctions under Fed. R. Bankr. P. 9011 when he submits a petition, pleading, written motion or other paper to the court that falls into one of four categories: (1) the document was submitted for an improper purpose (i.e., to harass one's adversary or to delay or drive up the costs of litigation); (2) the claims contained in the document are frivolous because they lack support under existing law; (3) the allegations contained in the document lack evidentiary support or are unlikely to have evidentiary support upon further investigation; or (4) the denials in the document are unwarranted based on the evidence. Fed. R. Bankr. P. 9011(b)(1)-(4). A motion for sanctions may be made under Fed. R. Bankr. P. 9011(c)(1)(A), as Busson-Sokolik did in this case, but any such motion is subject to a 21-day safe harbor provision.

Busson-Sokolik alleges sanctionable behavior on the part of MSOE based largely on statements contained in MSOE's brief before the district court. However, we need not reach the merits of any alleged violation on the part of MSOE because Busson-Sokolik undisputedly violated the safe harbor provision. On his own admission in the district court on October 31, 2008 and in his brief before this court, Busson-Sokolik concedes that he and his attorney did not provide MSOE with an adequate opportunity to withdraw the contested portions of its brief as required by the safe harbor provision of Fed. R. Bankr. P. 9011(c)(1)(A).

While we appreciate the candor with which Busson-Sokolik and his counsel have acknowledged their error in failing to abide by the 21-day window, their forthcomingness is not sufficient to persuade us to revive an inquiry into the allegations raised. Though Busson-Sokolik correctly points out that courts are able to enter an order for sanctions on their own initiative, there is no requirement under Fed. R. Bankr. P. 9011(c)(1)(B) that a court act *sua sponte* to impose sanctions. Chief Judge Clevert denied Busson-Sokolik's motion for sanctions based on the safe harbor provision, a decision which we find comports with the law. To the extent that he was nevertheless empowered to impose sanctions under Fed. R. Bankr. P. 9011(c)(1)(B) and declined to do so, we choose not to disturb that judgment.

### 2. Sanctions Imposed Against Busson-Sokolik and Chomi Prag

We now turn to the final issue for our review, namely whether the district court abused its discretion when it awarded sanctions for filing a frivolous appeal against Busson-Sokolik and his attorney, Chomi Prag.

The district court's imposition of sanctions was based on Fed. R. Bankr. P. 8020, which reads as follows:

> If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately

> filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Chief Judge Clevert made several determinations in support of his finding that Busson-Sokolik's "appeal, **as litigated,** was frivolous." He summarized Busson-Sokolik and Prag's behavior throughout the course of the proceedings as follows:

> Motions were filed by appellant without any basis in the rules, deadlines were ignored, procedural requirements were dismissed as unnecessary, and duplicative filings and objections were made thereby making it impossible for appellee to minimize its costs in this action.

In his decision, Chief Judge Clevert referenced appellants' reliance on the merger doctrine despite having waived it, several misstatements in the record made by Prag, the Fed. R. Bankr. P. 9011 motion filed against MSOE, which he called "baseless," and the improper filing of an appeal to this court while district court proceedings were still pending.

We do not find that Chief Judge Clevert erred in imposing sanctions based on Fed. R. Bankr. P. 8020. Busson-Sokolik and his attorney were free to appeal their case to the district court, but ample evidence suggests that the *manner* in which the appeal was

litigated bordered on the frivolous.[3] Courts consider a variety of factors in deciding whether to impose sanctions under Fed. R. Bankr. P. 8020.[4] We are not convinced that Busson-Sokolik and his attorney appealed in bad faith. However, bad faith is only one of the many factors to be considered in determining whether sanctions are appropriate in any given case. We are also not convinced that the appeal itself (as contrasted with the manner in which the appeal was litigated) was frivolous. Because of appellants' procedural error in failing to abide by the safe harbor provision of Fed. R. Bankr. P. 9011, the courts have never reached the merits of that claim. And because courts are able to find an exception to waiver, the merger argument, though unsuccessful, did have some basis in law. Appellants' most egregious errors in this litigation

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[3] An appeal is frivolous "when the result is obvious or when the appellant's arguments are wholly without merit." *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 459 (7th Cir. 1994). Even when genuinely appealable issues may exist, appellant's misconduct in arguing the appeal may render the appeal "frivolous as argued." *Dungaree Realty, Inc. v. United States*, 30 F.3d 122, 124 (Fed. Cir. 1994).

[4] For a comprehensive list of factors to be considered in evaluating a Fed. R. Bankr. P. 8020 motion, see *In re Maloni*, 282 B.R. 727, 734 (1st Cir. BAP 2002) ("Some of these factors are: bad faith on the part of the appellant; that the argument presented on appeal is meritless *in toto*; and, whether only part of the argument is frivolous. In addition, the court will consider whether appellant's argument: addresses the issues on appeal properly; fails to support the issues on appeal; fails to cite any authority; cites inapplicable authority; makes unsubstantiated factual assertions; makes bare legal conclusions; or, misrepresents the record.").

appear to have been procedural ones. These errors were numerous and well documented. Therefore, given the stringent standard of abuse of discretion by which we are bound, we find that the act of awarding sanctions under Fed. R. Bankr. P. 8020 was a reasonable exercise of Chief Judge Clevert's discretion.

Notwithstanding the reasonableness of the decision to award sanctions and the reasonableness of MSOE's fees[5], we do not find that the full amount awarded in the district court was necessary to achieve the deterrent purposes of Fed. R. Bankr. P. 8020. As such, we exercise this court's own discretion to reduce the sanctions imposed by half. In so doing, we acknowledge that "[w]hile an award of attorney's fees may be necessary to fulfill the deterrent purposes of Rule 8020, the award should not subject Appellant to financial ruin." *In re Bonfield*, 2005 WL 2810702 at *1 (W.D. Wash.). The fees accrued in this case are sizeable and would be difficult for many litigants to pay. Recognizing that Busson-Sokolik is a student who has filed for bankruptcy and finding no evidence of bad faith on the part of Busson-Sokolik or his attorney, we conclude that a reduction in sanctions is warranted in this case.

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[5] Of the district court award, $61,942.50 represents attorney's fees in connection with the appeal, which MSOE documented and submitted to Chief Judge Clevert on May 14, 2009. The statement includes work done from June 16, 2007 to May 14, 2009 billed at a rate of $225 per hour.

## III. CONCLUSION

Busson-Sokolik and his attorney, Chomi Prag, are jointly and severally liable to MSOE for $30,971.25, an amount which we find represents "just damages" under Fed. R. Bankr. P. 8020. Busson-Sokolik remains solely liable for $18,347.65, an amount which represents the July 11, 2007 judgment on decision in the bankruptcy court, coupled with $2,098.87 in judgment interest. The remaining $30,971.25 of the fee award is VACATED. On all other grounds, we AFFIRM.

## APPENDIX B

Electronically Filed 02/26/09 – Doc # 9 (7th Cir.)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 26, 2009

By the Court:

IN RE: DUSTIN JOHN BUSSON-SOKOLIK,
Debtor.

DUSTIN J. BUSSON-SOKOLIK,
Appellant,

No. 08-4317 v.

MILWAUKEE SCHOOL OF ENGINEERING,

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 2:07-cv-00801-CNC

Charles N. Clevert, Jr., Judge.

ORDER

On consideration of the jurisdictional memorandum filed by appellee on February 25, 2009,

IT IS ORDERED that appellee file, on or before March 5, 2009, a status report regarding the disposition of appellant's motion to alter or vacate judgment. If the district court has not issued its ruling, appellee should inquire of the district judge when a ruling is expected.

Briefing shall continue to be SUSPENDED pending further court order.

## APPENDIX C

Electronically Filed 12/10/09 – Doc # 79 (Dist. Ct.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DUSTIN JOHN BUSSON-SOKOLIK,

Appellant,

v.

MILWAUKEE SCHOOL OF ENGINEERING,

Appellee,

Case No. 07-C-0801

ORDER AWARDING FEES

During a May 8, 2009, hearing, this court denied appellant's motion to vacate order striking appellant's brief, motion for reconsideration and amendment of judgment, and granted appellee's motion for attorney's fees. The court further denied appellant's request for sanctions against appellee and its law firm. At the close of the hearing, the court instructed appellee to submit a comprehensive billing statement supporting the fees request. Having received the submissions of the parties and upon the court's finding that this appeal is frivolous

and appropriate for sanctions, the court awards fees and costs as set forth below.

Fees are awarded pursuant to Rule 8020 of the Federal Rules of Bankruptcy Procedure, which provides as follows:

> If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and a reasonable opportunity to respond, award just damages and single or double costs to the appellee.

A frivolous appeal has been defined as "one prosecuted with no reasonable expectation of altering the ... court's judgment...." *Giannopoluos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 412 (7th Cir. 1997).

The appeal, as litigated, was frivolous. With complete disregard for the Federal Rules of Bankruptcy Procedure, appellant's counsel appealed the order on an amended motion for reconsideration rather than the judgment entered by the bankruptcy court and failed to identify or obtain a transcript of the bankruptcy court's findings of fact or conclusions of law as required. Indeed, it took counsel fifteen months and direction from this court to file the transcript necessary to review this appeal. In addition, appellant's counsel filed frivolous Rule 9011 motions while ignoring the safe harbor provisions of the rule and wasted the court's time

with baseless allegations of opposing counsel's misconduct. Over time, counsel's theories on appeal have shifted to the point where she currently relies on a doctrine never raised before the bankruptcy court.

The record reflects that the court exercised patience with counsel as she repeatedly pled ignorance throughout the proceedings. During the May 8, 2009, hearing, before this court, the court highlighted numerous misstatements in the record by appellant's counsel and the court cited to some of the more troubling statements during the May 8, 2009, hearing. Most recently, appellant's counsel filed her appeal with the Seventh Circuit even though this court had not entered a final order or judgment and motions remain pending in this case.

Appellant objects to appellee's fees as unreasonable but does not explain how or why those fees are unreasonable. Instead, appellant asserts that appellee's fee request is untimely and inappropriate and cites Rule 11 of the Federal Rules of Civil Procedure. So that the record is absolutely clear on this point, this court finds that there has been no misconduct by appellee's counsel. Appellee's counsel filed his motion for fees as permitted by the rules. To continue to assert misconduct by appellee's counsel is inappropriate and a waste of judicial resources.

Having reviewed the submissions of appellee's counsel, the court is of the view that the requested fees are a direct result of a meritless appeal.

Motions were filed by appellant without any basis in the rules, deadlines were ignored, procedural requirements were dismissed as unnecessary, and duplicative filings and objections were made thereby making it impossible for appellee to minimize its costs in this action. The protracted litigation was a direct result of appellant's counsel's failure to familiarize herself with procedural rules and to comply with the same before proceeding. Ignorance of the law, of course, is no excuse; it is the responsibility of counsel to proceed in accordance with applicable law and to know whether a claim is clearly foreclosed by precedent. *See Werch v. City of Berlin*, 673 F.2d 192, 195 (7th Cir.1982). Moreover, fees can be imposed even though the losing plaintiff did not act in subjective bad faith. *Christiansburg Garment v. Equal Employment Opportunity Commission,* 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

Consequently, this court finds that Appellant's appeal violated Fed. R. Bank. Proc. 8020, and other rules of conduct. Hence, sanctions are warranted in this case.

Now, therefore,

IT IS ORDERED that judgment be entered in the amount of $80,290.15 against Dustin Busson-Sokolik.

IT IS FURTHER ORDERED that Attorney Chomi Prag is jointly and severally liable to the defendant for $61,942.50 of said judgment.

IT IS FURTHER ORDERED that post-judgment interest is awarded in accordance with applicable law.

Dated at Milwaukee, Wisconsin, this 10 day of December, 2009.

BY THE COURT

s/ C. N. Clevert, Jr.
C. N. CLEVERT, JR.
CHIEF U. S. DISTRICT JUDGE

## APPENDIX D

Electronically Filed – 11/03/08 – Doc # 46 (Dist. Ct.)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DUSTIN BUSSON-SOKOLIK vs. MSOE

Adversary Case No. 2006-02356

TELEPHONIC HEARING: July 11, 2007 .

BEFORE THE HONORABLE JAMES E. SHAPIRO.

REPORTER: AMY K. WALLOW.

APPEARANCES:
MS. CHOMI PRAG, Attorney for the debtor.
MR. GERALD CROUSE, Attorney for MSOE.

THE COURT: Attorney Crouse, good morning. I believe we have on the line Ms. Prag and Mr. Crouse. Good morning.

MS. PRAG: Good morning.

MR. CROUSE: Good morning.

THE COURT: At this time I will call the case of Dustin John Busson-Sokolik, adversary proceeding

2006-2356, versus Milwaukee School of Engineering, for the purposes of the Court entering its oral decision arising out of a hearing that was held on May 21, 2007.

Attorney Prag appears on the telephone on behalf of Mr. Busson-Sokolik, the debtor, and Mr. Crouse is appearing on behalf of the Defendant, MSOE.

Ms Prag, is your client with you?

MS. PRAG: No, he is not.

THE COURT: The Court at this time will proceed with its decision in this case. When I refer to Dustin, I am referring to the Plaintiff.

The debtor filed a petition for bankruptcy on -- under Chapter 13 on June 13, 2005. Subsequently, they converted the case to a Chapter on May 1st of 2006. This adversary proceeding was filed after the conversion of the case to a Chapter 7 -- having been filed -- Strike that -- An adversary proceeding had been filed August 21, 2006. It was brought by the debtor who seeks determination that an obligation to MSOE – and when I refer to the Defendant, that is, MSOE, a dischargeable debt. The Plaintiff is not contending that the debt is dischargeable on the grounds of undue hardship, rather his contention is that it is dischargeable because it doesn't qualify as a student loan within Section 523 (a)(8). This adversary proceeding came on for -- May 21st of this year. During the trial, testimony was received from the debtor and also from the mother of Dustin,

Denise Mallak. Testimony was further received on behalf of the Defendant from Steven Midthun, Who is the Director of Financial Aid at MSOE.

This Court has jurisdiction under 28 USC. The Court shall now enter its findings of fact and conclusion as well under the bankruptcy code 705 (2) and it reserves its rights to amend the finding of fact and law in a manner consistent with its decision it will be rendering.

The Plaintiff started attending school at MSOE in the fall of 1999 and actually began class on September 7th of 1999. Prior to commencing classes he did accept financial aid from a variety of sources that aids education. Those sources include the following, one scholarship for $7,000, a second one -- an MSOE grant for $4,000, the third was an MSOE loan for $3,000, which is really the subject of this adversary proceeding and further, a Federal Stafford loan on July 7th of 1999 and that would be before the debtor started classes. He described an award letter he obtained from MSOE in which he agreed to abide by the terms in this letter. In addition to the Federal aid, his mother took out a Federal PLUS loan and that would -- was used by the Plaintiff for educational expenses and the payment from all the sources allocated a third for each of the three quarters for classes. At that time, October 29th 1999, which was after the Plaintiff started the commencement of school, he obtained a student loan from MSOE. He testified that he was a student and it was shortly after that that he signed his promissory note in connection with the MSOE loan,

which had an interest rate of 7 percent.

The testimony which was presented by Mr. Midthun at the trial was that it is standard procedure for students to sign those notes for the loans after they received their respective award letters. That was done here. The Plaintiff did not repay any portion of the $3,000 MSOE loan and the only payment that was actually made came from the Chapter 13 Trustee when it was actually converted -- sometime -- Strike that – before the case was converted to a case under Chapter 7 so during that period of time -- and April 8th of 2005, which was before the debtor even filed the bankruptcy petition, MSOE had brought an action against the debtor in a state court action in Racine County and obtained a default for $5378.63, together with costs of $531.00 resulting in a total judgment of $5909.63. That sum included $250 attorney's fees. The judgment was entered April 8, 2005 and that was two months before the debtor filed his bankruptcy petition June 13th of 2005.

Now, in this adversary proceeding, the Plaintiff claims that the $3,000 which he obtained as part of the financial aid under a so-called MSOE loan fund was not student loan and he does rely in re, Chambers, 7th Circuit, 348 case. The Plaintiff claims $3,000 which was placed directly into a student account after he signed this note does not constitute as a student loan. He further asserted that even though he signed the note, he didn't know that after he started classes he states that there is no evidence of any prior or contractual agreement between

MSOE to evidence a loan to qualify this as a nondischargeable debt. He further argues that $3,000, which was put in a student account, was not even necessary because there were other funds that he obtained from other sources of financial aid including his mother's Federal PLUS loan and he had more than adequate funds to cover his educational expenses and finally, he contends that the only reason expenses and he signed this promissory note was because he was under the impression that if he hadn't done that, he would be unable to attend school and keep up with his classes and for all those reasons, he claims that this should be discharged in his bankruptcy.

The Defendant, on the other hand, contends that the $3,000 MSOE loan was clearly a student loan and that was a past due account and that the Chambers case readily distinguishes that. The key issue before this Court is the following: Is the $3,000 in connection with the so-called MSOE loan defined as a student loan within the 523 meaning? The debtor indicated or submits that it's not a loan because it was signed on October 29th which was after the debtor started classes. He started class September 7th, both in 1999. $3,000 in financial aid was paid over by MSOE directly into the debtor's student account on November 9th, which was after he started classes. MSOE points out that there was a separate document that was signed by the Plaintiff before he started classes and he is referring -- specifically is referring to an award letter dated April 13, 1999 which was signed on April 17, 1999 by the debtor in which the debtor agreed to all of the

terms of the award in which he accepted. That signature was on July 7, 1999 and that did indeed occur before he started schooling and the award letter clearly identified the $3,000 financial aid as quote, a loan, fund unquote. The award letter further stated, quote, all loans require additional paperwork, unquote, which that -- The Court concludes that meant the requirement of signing this promissory note. The award letter further states that no part of the $3,000 which was paid for financial aid would be disbursed into the debtor's account until that note was signed. The signing of the note occurred, as I said before, the actual turning over of the funds and once it was signed then the money was put in the debtor's student account.

Now, this Court is satisfied on the record in this case that the debtor knew he took out the loan. You know the old saying, if it looks like a duck and talks like a duck and walks like a duck, it's got to be a duck? This principle applies here. All signs which point to the conclusion that – I'll call the key mark parts of the transaction -- had earmarks of a loan. This Court is also further persuaded by the fact that a promissory note was not signed until after the debtor started schooling does remove this transaction from a student loan is not the case here. Here the debtor was in school at the time he signed the promissory note. He signed the note shortly before the commencement of school because, as I indicated before, MSOE's procedure required that be present before executing the notes. I conclude this does not change this transaction to constitute a student loan -- Strike that, a loan I should say. The

contract was accepted when he signed the note because among other things he signed this other document prior to the beginning of the note and furthermore, the note was signed not too long after he commenced school. As I previously pointed out, there was a separate document, an award letter that he signed before he started schooling. I view the award letter as an interrelated part of the overall transaction. So for the sake of argument if Chambers required in its ruling that a signed document had to be a obtained to qualify for a student loan, I believe the award letter fit that prerequisite and, moreover, it intended the letter as an interrelated promissory note as part of the overall transaction. The debtor also argues that the obligation she be declared dischargeable because it has not been shown that any of the $3,000 was, in fact, used for educational expenses. Instead he points out the fact that there was a refund turned over to his mother in connection with the Federal PLUS loan. I reject that argument.

The first part of the testimony which was presented by MSOE was it returned the excess funds to the debtor's mother because that was in accordance with certain Federal requirements, Federal regulation 164 (e) (1) which requires under her particular loan that if there were any excess, it had to be returned to her. More importantly than that is the fact regarding who obtained the loan does not change the nature of this loan from a student loan. The fact this loan may have been unnecessary and may not even been used for educational purposes are really immaterial. These parents were

made – among other cases I have read, a case by Judge Martin, in re Barth, 86 BR 146 that stated the following: quote, the language within Section 523 (a) (8) does not require whether the debtors received educational benefits. If a student were to take a guaranteed student loan and spend it on a car or a vacation, the student would not receive any educational benefits, it still falls within the scope of 523 (a) (8).

More recently, a 5th Circuit case, in re Murphy 282, F. 3d, 868, 2002, where the Court declared the following: Permitting students to discharge student loans in bankruptcy because students spent the money for other purposes like alcohol and even drugs creates absurd results and dischargeability under these circumstances we are awarding the irresponsible student borrower and punishing the responsible student borrower. There is nothing in Section 523 which requires that the loan must be necessary to be dischargeable.

I conclude that the $3,000 MSOE loan was an educational loan which was funded by MSOE, which I also find is a nonprofit institution.

Finally, in this regard the Plaintiff asserts that the loan shouldn't be nondischargeable because he was under the impression he had to sign the note order to go school. I'm not persuaded by this argument. I found the debtor in this case was an intelligent man. He was an adult. He was 18 years of age and this adult graduated with a 3.85 grade point average. I further find that there is nothing in the record of

this case to lead this Court to conclude that he was misrepresented by any action taken by MSOE in any way. If he, indeed, was under that impression, which I doubt he was, a mistake is not justified to constitute a dischargeable debt. So therefore, I conclude that the debt is an educational loan funded by a not for profit institution and it's nondischargeable under 523 (a) (8).

Now, that takes us to the question of damages. What is the appropriate measure of damages? Clearly principle and interest and collection costs are included and reasonable attorney's fees are nondischargeable and are so provided for in the note itself. If it hadn't been, then it would be a different story but it was and therefore, the parties must live up to the terms of that contracted obligation in that regard. The Court finds that the amount of principle and interest and costs after taking into account the payments in which were made by the Chapter 13 Trustee which also included as part of damages, post judgment costs and disbursements – post interest I should says, post – cost and interest – and interest totaling $7,293.78 . On that, of course, is consistent with the report I got from Mr. Crouse and I find further that the attorney's fees in this case in the amount of $8,955 are reasonable. I do note that I read over the time and hours of 39.8 and I find further that he did make a reduction in the hourly rate from $250 to $225 and I find $225 to be reasonable.

Now, I have not lost sight of the fees here that were the collection costs which arose out case. But

the US Supreme Court decision in re, the City Riverside versus Rivera, 477 US 561, pages 564, 568 through 569, stated reasonable attorney's fees may in some occasions exceed damages. The key inquiry here is really were the attorney's fees incurred by MSOE this adversary proceeding necessary and were they reasonable? There is nothing in the record to lead me to believe the contrary. Crouse's representation of MSOE was required and, in my view, did not merit any reduction. It was not over zealous and quite the contrary, Attorney Crouse had a very vigorous opponent and I respect her for that and he had to do what he did.

So I, therefore, find that the entire damages including the attorney's fees as well as the other costs and expenses and principle and interest are nondischargeable in the sum of $16,248.78 and judgment may be entered in that amount and interest which I'm going to impose on that and that the 7 percent was the contracted rate and that's the decision Court.

What I will do is I will prepare an order for judgment and is there anything further I will start with you, Ms. Prag?

MS. PRAG: I guess I'm wondering how my client is going to pay this back? Is it going to be a monthly payment?

THE COURT: That is something I would hope that you and Mr. Crouse could work out because I hadn't intended to impose any type of deal. I'm

imposing nondischargeability of the debt that – that was what was really before me. I would hope that you could work that out.

MR. CROUSE: Very well. I just need to verify a few things. Is the interest going to run 7 percent from today?

THE COURT: To -- from the date of judgment which is -- should be entered in a few days.

MR. CROUSE: Is the Court preparing the judgment or do I?

THE COURT: I will prepare the order of judgment and the clerk's office will send you copies.

MR. CROUSE: Very well.

THE COURT: That should take care of that. Thank you both. You both had a very difficult case as I indicated at the trial and you both did a very fine job representing your clients and that's about all I have to say. Thank you very much.

MS. PRAG: Thank you. Bye.

THE COURT: I have an additional comment. Good morning again. I had one additional comment to make and put it on the record as well. I'm recalling the case of MSOE and Busson. I just rendered my decision and I wanted to add one thing to my decision and that in my decision it is understood that the Plaintiff has no right to recovery

of plaintiff's attorney's fees from MSOE and I will leave that matter to you, Ms. Prag, between you and your client. That's all I wanted add.

MS. PRAG: Thank you.

THE COURT: Thank you. That's all. Thank you both very much. Goodbye.

(Telephonic hearing concluded.)

STATE OF WISCONSIN
COUNTY OF MILWAUKEE

SS:

I, Amy K. Wallow, hereby certify that I am court reporter in and for Milwaukee County, Wisconsin, that I have carefully compared the foregoing pages with my stenographic notes, and that the same is a true and correct transcript.

Dated at Wauwatosa, Wisconsin this 24th day of October, 2008.

s/ Amy K. Wallow
Amy K. Wallow
Certified Court Reporter

Notary Public - Amy Wallow - SEAL - State of Wisconsin

## APPENDIX E

Electronically Filed 03/15/11 – Doc # 77 (7th Cir.)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 15, 2011

Before

WILLIAM J. BAUER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

Nos. 08 - 4317, 09 - 4009 & 10 - 1456

IN RE:
DUSTIN JOHN BUSSON - SOKOLIK,

*Debtor,*

DUSTIN JOHN BUSSON - SOKOLIK,

*Appellant,*

v.

MILWAUKEE SCHOOL OF ENGINEERING,

*Appellee,*

and

APPEAL OF: CHOMI PRAG.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:07 - cv - 00807 - CNC

Charles N. Clevert, Jr. *Judge*.

ORDER

On consideration of appellants Dustin John Busson - Sokolik and Chomi Prag's petition for rehearing and rehearing *en banc* filed on February 22, 2011, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition for rehearing and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is, therefore, ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

## APPENDIX F

Electronically Filed 07/24/07 – Doc # 37 (Bk. Ct.)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

DUSTIN J. BUSSON-SOKOLIK,

Debtor.

Chapter 7 Proceedings

Case No. 05-29931-jes

DUSTIN J. BUSSON-SOKOLIK,

Plaintiff,

vs.

MILWAUKEE SCHOOL OF ENGINEERING,

Defendant

Adversary No. 06-2356

### ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR RECONSIDERATION

The plaintiff has filed an amended motion for reconsideration of this court's oral decision rendered on July 11, 2007. More specifically, the plaintiff

asks this court to reconsider its order for judgment and disallow all of the attorney's fees ordered to be paid by the plaintiff to the defendant.

In its decision and order for judgment, this court found in favor of the defendant and required the plaintiff to pay to the defendant **$16,248.78**, which included costs and attorney's fees. The costs and attorney's fees which this court found to be reasonable total $8,955.00. The court found that this obligation from the plaintiff to the defendant arose out of a nondischargeable student loan under 11 U.S.C. § 523(a)(8).

The plaintiff asserts that there is nothing in the Bankruptcy Code which authorizes payment from the plaintiff to the defendant of the defendant's attorney's fees. However, in Klingman v. Levinson, 831 F.2d 1292, 1296-1297 (7th Cir. 1987), the Seventh Circuit Court of Appeals declared that, when a debt is evidenced by a note or other contract which contains a provision for payment of attorney's fees to the holder of the note and if the noteholder prevails in litigation, such attorney's fees that are awarded are nondischargeable. See also In re Sheridan, 105 F.3d 1164, 1166 (7th Cir. 1997). Wisconsin adheres to this view under its state law. Wisconsin recognizes the American Rule that each party generally is responsible for its own attorney's fees and the prevailing party is not entitled to recovery against the other party, except if authorized by statute or contract. Reid v. Benz, 629 N.W.2d 262, 263 (Wis. 2001); Gorton v. Hostak, Henzl & Bichler SC, 577 N.W.2d 617, 624 (Wis. 1998).

That is what happened in this case, where the court ruled in favor of the defendant. The promissory note for a $3,000.00 loan was signed by the plaintiff as borrower to the defendant as lender on October 29, 1999. The promissory note contained a provision which obligated the plaintiff to pay for the defendant's attorney's fees incurred in connection with any collection costs for the unpaid loan balance. The defendant's attorney's fees were added to the unpaid balance of the student loan as a part of the nondischargeable debt. This should not be a surprise to the plaintiff. The defendant, in its answer to the adversary complaint, demanded not only that the student loan be declared nondischargeable, but in addition, that it recover from the plaintiff its attorney's fees and costs. While this court has the discretion to determine the reasonableness of such attorney's fees and costs, where, as in this case, the contractual agreement called for attorney's fees to be paid, such a provision is valid and enforceable.

The attorney's fees ordered to be paid by the plaintiff to the defendant were not imposed as sanctions. They were ordered to be paid because of the contractual arrangement between the plaintiff and defendant.

The defendant also contends that the promissory note did not create the loan. He claims that the award letter dated July 9, 1999 (which he signed before starting school and before signing the promissory note) is the document which created the student loan. The court rejects that contention.

The student loan was created when the promissory note was signed by the plaintiff. Although the award letter is interrelated with the promissory note, the plaintiff 's obligation to pay this loan arose when he signed the promissory note. Accordingly,

IT IS ORDERED that the plaintiff's amended motion for reconsideration is DENIED.

Dated at Milwaukee, Wisconsin, this 24 day of July, 2007.

BY THE COURT:

s/ James E. Shapiro
JAMES E. SHAPIRO
U.S. BANKRUPTCY JUDGE

## APPENDIX G

Electronically Filed 01/27/10 – Doc # 93 (Dist. Ct.)

United States District Court

EASTERN DISTRICT OF WISCONSIN

DUSTIN JOHN BUSSON-SOKOLIK,

Appellant,

v.

MILWAUKEE SCHOOL OF ENGINEERING,

Appellee,

JUDGMENT

Case No. 07-C-0801

This action came before the court. The issues have been decided and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that the decision of the bankruptcy court is affirmed.

**IT IS FURTHER ORDERED AND ADJUDGED** that judgment is entered against Dustin Busson-Sokolik and in favor of Milwaukee School of Engineering in the amount of $80,290.15.

IT IS FURTHER ORDERED AND ADJUDGED that, of the aforementioned sum, Attorney Chomi Prag is jointly and severally liable to the Milwaukee School of Engineering for the amount of $61,942.50.

APPROVED:

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
Chief U.S. District Judge

JON W. SANFILIPPO
Clerk

January 27, 2010
Date

s/ C. Fehrenbach
(By) Deputy Clerk

## APPENDIX H

Electronically Filed 07/11/07 – Doc #28 (Bk. Ct.)

busson-sokolik order 07/11/07.2

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re: DUSTIN J. BUSSON-SOKOLIK
Debtor.
Chapter 7 Proceedings
Case No. 05-29931-jes

DUSTIN J. BUSSON-SOKOLIK

Plaintiff

MILWAUKEE SCHOOL OF ENGINEERING

Defendant.

Adversary No. 06-2356

### ORDER FOR JUDGMENT

The court having rendered its oral decision in the above-entitled adversary proceeding this date,

including its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Bankruptcy Procedure and which findings of fact and conclusions of law may be found in the notes of the court reporter,

IT IS ORDERED:

1. Plaintiff's adversary complaint is **DISMISSED**.

2. The debt due to the defendant Milwaukee School of Engineering, from the plaintiff, Dustin J. Busson-Sokolik is declared **NONDISCHARGEABLE** pursuant to 11 U.S.C. § 523(a)(8) in the sum of $16,248.78, which includes costs and attorney's fees. In addition, interest at the rate of 7% per annum shall accrue on this nondishcargeable debt from the date of entry of the judgment.

3. **THE CLERK OF THE UNITED STATES BANKRUPTCY COURT SHALL ENTER JUDGMENT ACCORDINGLY.**

Dated at Milwaukee, Wisconsin, this 11 day of July, 2007.

BY THE COURT:

s/ JAMES E. SHAPIRO
JAMES E. SHAPIRO
U.S. BANKRUPTCY JUDGE

c:
Chomi Prag, Esq.
10625 West North Avenue, Ste. 227
Wauwatosa, W1 53226

Gerald L. Crouse Jr., Esq.
400 North Broadway, Ste. 400
Milwaukee, W1 53202

# APPENDIX I

11 U.S.C. § 523(a)(8) Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

Federal Rule of Bankruptcy Procedure 8020 Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Federal Rule of Appellate Procedure 38
Frivolous Appeal—Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Federal Rule of Appellate Procedure 4(a)(4)
Effect of a Motion on a Notice of Appeal

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

Federal Rule of Appellate Procedure 6(b)
Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply;